No. 83-189

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES LEWALLEN,
LESLIE COOPER,
ALBERT WRIGHT . . . . . Petitioners

versus

COMMONWEALTH OF KENTUCKY . Respondent

Brief in Opposition to Petition for Writ of Certiorari from the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. Should Certiorari Be Denied When None of the Considerations Governing Review Are Present Under Rule 17?

II. Should Certiorari Be Denied to Leslie Cooper Because He Testified At Trial?

III. Should the Court Apply *Carter* v. *Kentucky*, 450 U. S. 288 (1981), Retroactively, Where the Error, If Any, in Not Giving the "Adverse Inference" Instruction Was Harmless Error?

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COMMONWEALTH OF KENTUCKY - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

The respondent respectfully prays that the Petition For Writ of Certiorari be denied.

OPINION BELOW

JURISDICTION CONSTITUTIONAL PROVISIONS

Pursuant to Rule 34.2 of the Supreme Court of the United States, the subject areas referred to above have been presented by the petitioners to the satisfaction of the respondent. Furthermore, all parties to the proceedings to the Kentucky Courts are listed in the caption with the exception of Mary Del Wright, who was found not guilty by the Campbell District Court jury.

STATEMENT OF THE CASE

Again, pursuant to Rule 34.2, the respondent wishes to add information omitted in the petitioners' Statement of the Case.

Both police officers who purchased the adult magazines on April 9, 1980 testified that it was obvious upon entry to the bookstore that sexually explicit materials were being sold there.

James Lewallen held the bookstore occupational license on April 9, 1980 and had filed current occupational license tax forms and employer withholding forms on behalf of his business which identified him as either the license holder or owner. James Lewallen was further observed on numerous occasions selling the bookstore materials to customers.

Albert Wright was observed at numerous times sitting behind the sales counter answering the telephone while the business was opened. He was further observed on a number of occasions taking money out of and putting money in the cash register behind the counter. No customers were permitted in the cash drawer. Evidence demonstrated that the employees were more attentive to their duties when Albert Wright was present.

Leslie Cooper admitted he sold the materials found to be obscene and that he was clerking in the store at the direction of James Lewallen.

The sentences imposed by the jury against James Lewallen and Albert Wright were the maximum penalties permitted under the statute for the offense charged.

REASONS FOR DENYING WRIT

I. None of the Considerations Listed in Rule 17 Are Applicable to the Case At Bar.

Although obviously not controlling, Rule 17 of the Rules of this Court indicate the character of the reasons that will be considered in a petition for a Writ of Certiorari. Since the Kentucky Courts have accepted and followed the applicable federal law, the petition should be denied.

II. Leslie Cooper's Testimony Renders *Carter* v. *Kentucky* Inapplicable.

Certiorari should not be granted concerning Leslie Cooper and *Carter* v. *Kentucky* should not be applied to his case because he testified during the trial. Such testimony stands as a waiver of any right to the "adverse inference" instruction.

III. Based On the Evidence At Trial, Which Was So Substantial and Overwhelming, and in Light of the Totality of the Circumstances, the Failure to Give the "Adverse Inference" Instruction Could Not Possibly Have Changed the Result.

In *Kentucky* v. *McIntosh,* 646 S. W. 2d 45 (Ky. App., 1982) decided February 16, 1983 by the Supreme Court of Kentucky, it was held that the failure to give a requested instruction on the effect of the defendant's refusal to testify can be nonprejudicial error if there is overwhelming evidence of guilt and the result would not have been any different when the case is considered

as a whole. In this case, the defendants' conviction was upheld.

The Court observed in that decision that the rule is the same in Mississippi, Nevada and Indiana, other jurisdictions which have considered the same question in light of *Carter* v. *Kentucky,* 450 U. S. 288 (1981).

The Court further observed that in *Carter, supra,* the question was left open as to whether the failure to give an "adverse inference" instruction was nonprejudicial.

In the present case, the evidence was overwhelming against James Lewallen and Albert Wright. James Lewallen was the license holder of the bookstore, the lessee of the building owned by Albert Wright, the day-to-day operator of the business and the person who directly arranged for Leslie Cooper to work on the day he sold the obscene materials to the plain clothed police officers. Albert Wright was the co-owner of the real estate, was observed regularly behind the counter of the bookstore in full view of the materials to be sold, made use of the cash drawer behind the counter, was often seen in James Lewallen's company and had attempted to intervene on behalf of Lewallen concerning a license change for the adult bookstore.

In Kentucky, a defendant such as Albert Wright, as a landlord, may be convicted for criminal acts upon the premises he owns if the landlord performs acts or otherwise encourages or lends assistance to the commission of the acts. *Bradley* v. *Commonwealth,* Ky., 257 S. W. 11 (1925), *Whitt* v. *Commonwealth,* Ky., 298 S. W. 1101 (1927). The landlord is also culpable if the tenant was given the opportunity or means to commit

a crime upon the landlord's property. See *Wagner* v. *Commonwealth*, Ky., 182 S. W. 2d 661 (1964), *Hurd* v. *Commonwealth*, Ky., 78 S. W. 2d 9 (1935).

As a further indication of the overwhelming evidence against the defendants, the jury imposed the maximum sentence. In Kentucky, the jury determines guilt and the sentence based solely on the evidence heard at a single trial; there is no bifurcated hearing.

In a parallel situation, the Court has stated in *Kentucky* v. *Wharton*, 441 U. S. 786 (1979) and *Taylor* v. *Kentucky*, 436 U. S. 478 (1978) that the failure to give an instruction on the presumption of innocence does not in and of itself violate the Constitution. Such a failure must be evaluated in light of the totality of the circumstances including all of the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming and other relevant factors to determine whether the defendant received a fair trial.

In light of the totality of the circumstances, it is obvious that the defendant's failure to receive the "adverse inference" instruction did not effect the decision of the jury. The failure of the defendants to testify was dealt with by defense counsel in voir dire, opening argument and closing argument. In voir dire, the jurors indicated that the failure of the defendant to testify would not affect their consideration.

A further indication that the failure to give the "adverse inference" instruction was nonprejudicial, was that the jury found the fourth defendant, Mary Del Wright, who also did not testify, not guilty. It is

obvious that the jury did not find James Lewallen and/or Albert Wright guilty simply because each failed to testify, or that it was even a consideration.

The Court should not grant certiorari based on the *Mack* v. *Oklahoma,* 103 S. Ct. 201 (1982). That case dealt strictly with the retroactive effect of *Carter, supra,* and not with whether the failure to give the "adverse inference" instruction was nonprejudicial error. Since *Mack, supra,* had been decided at the time the Kentucky Supreme Court denied discretionary review in the present case and assuming that case was considered by the Court in its ruling, it becomes apparent that discretionary review was denied on the grounds that, in light of the totality of the circumstances, the failure to give the instruction was nonprejudicial error.

CONCLUSION

WHEREFORE, Commonwealth of Kentucky respectfully submits that based on the overwhelming evidence of guilt and in light of the totality of the circumstances, the failure to give the "adverse inference" instruction was nonprejudicial, that the Kentucky Court of Appeals and the Kentucky Supreme Court properly denied discretionary review, that there are no special or extraordinary reasons for the United States Supreme Court to grant discretionary review, and that, therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATION

I hereby certify that I have, this 2nd day of September, 1983, mailed two (2) true copies of the foregoing Brief for the Respondent to: Hon. W. Robert Lotz, Jr., Counsel of Record, P.O. Box 1078-213 E. Fourth Street, Covington, Kentucky 41011.

Assistant Attorney General